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JAMES H. McKEN

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 239.

THE SUN PRINTING AND PUBLISHING ASSOCIATION

vs.

CHARLES WILLIAM EDWARDS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT.

THOMAS F. BAYARD,
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GEO. A. WOLF, WILMINGTON, DEL.

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SUPREME COURT OF THE UNITED STATES.

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vs.

CHARLES WILLIAM EDWARDS.

No. 239. ON CERTIFICATE.

BRIEF FOR DEFENDANT.

STATEMENT OF FACTS.

The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the southern district of New York. The complaint further avers and the answer admits that "plaintiff is a resident of the State of Delaware." Upon the trial the plaintiff testified "I started in the printing business about thirty years ago * * * * * I have been on the New York Tribune, on the World, the Philadelphia Record and the American Press Association. * * * * * * * I had charge of the Morning News, Wilmington, Delaware. * * * In this city (New York) I worked on the New York Tribune, on the Sun, on the World, and in the American Press Association. * * * Just prior to my going to work upon the New York Sun (under the contract in suit) I was the publisher and business manager of the Evening Journal of Wilmington, Delaware, and president of the company. * * * (After my discharge from the employ of the Sun) I finally secured a place with the New Haven Palladium, and I was there a while. * * * One of the reasons I left the New Haven Palladium was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware." (Certificate Page 1.)

THE QUESTION CERTIFIED.

"HAD THE CIRCUIT COURT JURISDICTION OF THE CONTROVERSY BETWEEN PLAINTIFF AND DEFENDENT."

I.

IF THE DIVERSITY OF CITIZENSHIP AFFIRMATIVELY APPEARS UPON THE RECORD, THE JURISDICTION OF THE CIRCUIT COURT MUST BE AFFIRMED.

The law on this point is well settled by the leading case of Robertson vs. Cease 97 U. S. 646, in which the Court says in relation to *the facts which in legal intendment constitute the citizenship* of the parties in the Circuit Court, "In cases where jurisdiction depends upon the citizenship of the parties, such *citizenship, or the facts which in legal intendment constitute it* should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness in other parts of the Record."

Grace vs. American etc. Insurance Co. 109 U. S. 278.
Peper vs. Fordyce 119 U. S. 469.
Continental Insurance Co. vs. Rhoads, 119 U. S. 237.

II.

IT AFFIRMATIVELY APPEARS UPON THE RECORD THAT THE SUN PRINTING AND PUBLISHING ASSOCIATION IS A CITIZEN OF THE STATE OF NEW YORK IN THE SOUTHERN DISTIRCT OF NEW YORK.

The Complaint avers and the Answer admits that The Sun Printing and Publishing Association is a domestic corporation, duly organized and existing under the laws of the State of New York, having its principal office for the transaction of business in the Southern District of New York. (Certificate page 1.)

The law is now well settled that an affirmative averment that one of the parties is a corporation, duly organized and existing under the laws of a certain State, is a sufficient allegation to establish the citizenship of the party in that State.

Louisville R. R. Co. vs. Letson, 2 Howard 497 (558.)
Marshall vs. B. & O. R. R., 16 Howard 314 (329).
Express Co. vs. Kountze, 8 Wallace 342 (351).
Muller vs. Dows, 94 U. S. 444 (445).
Black's Dillon on Removal of Causes, Sec. 178.
Foster's Federal Practice, Sec. 19, Page 67 (3rd. Ed.)

III.

IT AFFIRMATIVELY APPEARS UPON THE RECORD THAT CHARLES WILLIAM EDWARDS IS A CITIZEN OF THE STATE OF DELAWARE.

The Complaint avers and the Answer admits that Edward is a *resident of the State of Delaware.* (Certificate page 1.)

The positive and uncontradicted testimony of Edwards shows that just prior to entering into the contract (the breach of which caused this action) he was the publisher and manager of a newspaper in *Wilmington, Delaware,* and President of the Company; that after his discharge by the Sun Printing and Publishing Association, he obtained a place on the New Haven Palladium, which last position he left, giving as a reason *that it was too far away from his home,* that *he lived in Delaware,* and had to go back and forth, and that *his family were over in Delaware.* (Certificate Page 1.)

a.

Edwards was a citizen of the State of Delaware.

In the case of Poppenhauser vs. India Rubber Company 14 Fed. Rep. 707, the Court says, "For the purpose of jurisdiction of the Courts of the United States, *domicile is the test of citizenship.*"

Carter on Jurisdiction of Federal Courts, (Page 18), says: "But in considering who are citizens of a State for the purposes of jurisdiction of Federal Courts, the only question is as to the *intent to have a home or fixed residence there. State citizenship follows domicile as an operation of law*, and whatever wishes or intentions a party may have as to claiming citizenship in a given State, it is determined by law, and follows his domicile irrespective of his wishes, * * *. *If his domicile be established, citizenship in the State of such domicile follows as a legal consequence.*"

Applying the facts as affirmatively shown on the record to the two citations just made we find that Edwards not only had *a residence in Delaware, but a home in Delaware*, and furthermore *openly expressed his intent to return to Delaware as his home.* In other words, his domicile is affirmatively established in Delaware, and his citizenship follows as a legal consequence.

Story in his Conflict of Laws Sec. 44. says, that *two things* must concur to constitute *domicile.* "First: residence. Secondly: the intention of making it the home of the party."

Wharton in his Conflict of Laws section 21, (Sec. Ed.) says, "*Domicile is a residence acquired as a final abode.* To constitute it there must be: (1) residence, actual or inchoate; (2) the non-existence of any intention to make a domicile elsewhere."

There can be no question as to the law as thus laid down by Story and Wharton, and as adopted by the United States Supreme Court in Mitchell vs. United States, 21 Wallace. 350, wherein Swayne J. says (352), "*Domicile* has thus been defined: "*A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.*" This definition is approved by Philmore in his work on the subject. By the term domicile, in its ordinary acceptation is meant the place where a person lives and has his home. *The place where a person lives is taken to be his domicile until facts adduced establish the contrary.*"

Again quoting from Carter on Jurisdiction of Federal Courts, (page 18), "*Test of Citizenship*—It may be therefore laid down that for the *purpose of jurisdiction of Federal Courts* a citizen of the United States residing permanently—i.e. *with the present intention of remaining —in any State as a citizen of that State* * * *. Domicile implies more than mere residence. Primarily a person's domicile is his legal home or a place where the law will presume he intends to permanently reside although he may be absent from it at the time."

In Anderson vs. Watt, 138 U. S. 694 Waite, C. J. says (706), "*The place where a person lives is taken to be his domicile until facts adduced establish the contrary*, and a domicile when acquired is presumed to continue until it is shown to have been changed."

In the case of Rucker vs. Bolles, 80 Fed. 504. Thayer J. (508) says, "It is his *intention to make* the place * * * *his permanent* place of *domicile* which *determines whether he has become, a citizen of that State* * * *. As general rule, a person's intentions in that respect can be ascertained in no other way than by his declarations * * *."

There can be no question that the uncontradicted testimony of Edwards shows that *his home was in Delaware;* that *he lived* in *Delaware;* that *his family was in Delaware*; and that he had to *go back and forth from Delaware*, thus evincing not only the positive declaration as to his domicile, but also the positive declaration that in spite of his peregrinations, he was still *animo manendi* as to his domicile in *Delaware*, and a domiciled citizen of Delaware.

Again quoting from Carter on Jurisdiction of Federal Courts, (Page 19), "The distinction between domicile and mere residence may be shortly put as that between residence *animo manendi* and residence *animo revertendi*. Mere residence may be for a transient purpose, as for business, for a fixed period, or limited by an expected future event, upon the happening of which there is a purpose to return or remove."

In Marks vs. Marks, 75 Fed. Rep. 321, the Court says (324), "*Citizenship in relation to the federal judiciary*, must be of that kind which identifies the party with some particular State of which he is a member. Butler vs. Farnsworth, 4 Wash. C. C. 101, Morris vs. Gilmer, 129 U. S. 315, Mitchell vs. U. S., 21 Wallace 350. *To constitute citizenship of a State in relation to the Judiciary Acts requires: First, residence within such State; and, second: an intention that such residence shall be permanent. In this sense State citizenship means the same thing as domicile in its general acceptation.* The act of residence does not alone constitute the domicile of a party, *but it is the fact of residence, accompanied by an intention of remaining which constitutes domicile.* The distinction between *domicile* and *mere residence* may be shortly put as that between residence *animo manendi* and residence *animo revertendi* * * * *. The two elements of residence, and the intention that such residence shall be permanent, must concur to make citizenship."

See also Carter on Jurisdiction of Federal Courts, (page 20), "It is a conclusion of Law upon certain facts which constitutes him a citizen of the State where he permanently resides."

It is respectfully submitted that the law in the cases hereinabove quoted when applied to the facts testified to by Edwards *affirmatively shows that he was a citizen of the State of Delaware*, and as such a citizen clothed with all the rights flowing from such a status. In other words, that as a resident in Delaware, with his home in Delaware, and with the animus manendi Edwards was a citizen of the State of Delaware, and therefore fully qualified to avail himself of the jurisdiction of the United States Circuit Court for the Southern District of New York in bringing this suit.

b.

Edwards was not a citizen of the State of New York in that he was a citizen of the State of Delaware.

While it no where, even by suggestion, appears upon the record that Edwards was a resident, much less a citizen of the State of New York, yet grant, for the sake

of argument, that he had been both a resident and a citizen of the State of New York at some time prior to his entering into the employ of the Sun Printing and Publishing Association. Then his right to bring suit in the Circuit Court would be, among other things, predicated upon his *being a citizen* of some other State than New York, and his removal to another State, *even though for the sole purpose of bringing suit*, would enable him to go into the Circuit Court, if he could, as he has so patently done in this cause, *show that he was domiciled in Delaware*, or any State other than New York.

In speaking of the determination of citizenship by acquiring residence in a State, the Court says in Butler vs. Farnsworth, 4 Wash. C. C. 101 (104), "If, on the other hand, *the sincerity of the removal, for the purpose of permanently residing in the State which the person has selected, be not questioned, and his acts correspond with such purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicile.* * * * * *It is a conclusion of law upon certain facts, which constitutes him a citizen of the State where he permanently resides.*"

In the case of Cooper vs. Galbraith 3 Wash. C. C. 546, the Court says (553), "But to give jurisdiction to the Courts of the United States the suit must be between citizens residing in different States. * * * *If a citizen of one State should think proper to change his domicile, and to remove himself and family, if he have one, into another State, with a bona fide intention of abandoning his former place of residence, and to become an inhabitant or resident of the State to which he removes; he becomes, immediataly upon such removal, accompanied with such intention, a resident citizen of that State, and may maintain an action in the Circuit Court of the State which he has abandoned, or in that of any other State, except the one in which he has settled himself.*"

This last case is quoted with approval in Dickerman vs. Trust Company, 176 U. S. 181, where the Court in

referring to it says, (192), "The law is equally well settled that, if a person take up a ***bona fide residence in another State, he may sue in the Federal Court,*** notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the Court was held."

Jacobs in his Treatise on the law of Domicile says (section 134), "When the transfer of bodily presence has been accomplished the *factum* is complete; and generally speaking, no further act is necessary, but domicile vests immediately, provided the requisite animus be present. ***Uno solo die constitutur domicilium si de voluntate appereat***—says D'Argentre; and Grotius puts it still more strongly:—***uno momento domicilium constitutum intelligitur.***"

In Winn vs. Gilmer 27 Fed. 817, Turner J. says (817), "'citizenship,' as used in the law under consideration, ***means residence with the intention of remaining permanently at that place.*** A man may reside in a State for an indefinite period of time without becoming a citizen, but the moment a man takes up his residence in a State different from that where he formerly was domiciled or was a citizen, with the intent or purpose of making the new place of residence his future permanent home, that moment, he loses his former domicile, and becomes domicled in the new place; ***or, in other words, he ceases to be a citizen of the former place of residence, and becomes a citizen of the State of his adoption.***"

Story's Conflict of Laws, Sec. 47. 48.
Wharton's Conflict of Laws, Sec. 58.

Applying the last seven citations to the supposition as to prior residence in New York, coupled with Edwards' positive testimony as to his domicile, animo manendi, in Delaware, there can be no question as to his citizenship in Delaware being a proper ground for bringing this action.

Again, to approach the question from another point of view, Dicey in his Treatise on The Conflict of Laws

in Chapter II. Rule 2, says—"No person can at any time be without a domicile. * * * * * It is a settled rule that no man shall be without a domicile. (quoting Udny vs. Udny, L. R. 1 Sc. App. 441, and Bell vs. Kennedy, ibid. 307). * * * * The principle here laid down is in effect, that for the purpose of determining a person's legal rights or disabilities, the Courts will invariably hold that there is some Country in which he has a home and will not admit the possibility of his being in fact homeless, or in other words, even if he is in fact homeless, a *home will, for the purpose of determining his legal rights or those of other persons, always be assigned to him by a presumption or fiction of law.*"

See also Guier vs. O'Daniel, 1 Binney (Pa.) 350.

Bluntschli, National Law Codified, Sec. 394 says: "Some persons may in rare instances be under the jurisdiction of two different States. *In case of conflict, the preference will be given to the State in which the individual or family in qestion have their domicile.*

If these last citations be applied to the facts as they appear on the Record in this cause, the uncontradicted statements of Edwards are binding upon the Court, and he is shown *affirmatively* to be a domiciled citizen of State of Delaware, and not of New York.

IV.

THE JURISDICTION OF THE CIRCUIT COURT SHOULD BE AFFIRMED.

It is respectfully submitted that the foregoing statement of fact and law conclusively proves the right of the Circuit Court to entertain jurisdiction in this case.

THOMAS F. BAYARD,

Attorney for Defendant.